There is one last point in dispute which is comparatively a minor one. The Vendor's solicitors gave to the Purchaser's solicitors on June 17, 1983, notice to complete the sale. So far as the breach under clause 14(2) is concerned – the failure to give the notice to complete – it was remedied on June 17, 1983, and the liability of the Vendor for payment of liquidated damages terminated as of that day. The parties were then obliged under clause 14(1) to complete the transaction within 14 days from that day; but they did not complete the transaction within the period. It appears that there were two obstacles in the way. First, the Purchaser required an acknowledgement for production of prior title deeds duly executed by the Vendor to be delivered on completion, and secondly, the Purchaser insisted on deduction of a sum of $376,874.63 as liquidated damages computed from December 31, 1981 to June 16, 1983 which the Vendor refused to accept. The acknowledgement of production of prior title deeds is a reasonable and prudent requirement in conveyancing practice but the Purchaser should have made this request much earlier; its solicitors did not inform the Vendor's solicitors of this requirement until June 22, 1983. At any rate, under clause 14(1) this is not a document required to be delivered by the Vendor on completion and the Purchaser was not entitled to this additional document on completion; in this respect the Purchaser was in error. A more major obstacle to the completion of the sale was undoubtedly the deduction of liquidated damages which was hotly in dispute. On this point, neither party gave way and each adopted an uncompromising stand. The sensible and practical solution is for the Purchaser to pay this amount to its own or the Vendor's solicitors to be held as stakeholders on an interest bearing account to abide by the decision of the court – a course which was not proposed by the Vendor's solicitors until December 8, 1983 and the proposal was not accepted by the Purchaser's solicitors until January 4, 1984. Neither party had really acted sensibly and reasonably. It is submitted by Mr. Lowe that if the Vendor wrongfully failed to complete the sale, liquidated damages under clause 14(2) should continue to accrue, I do not agree. If the Vendor wrongfully failed to complete the sale after the notice to complete was given, then it was in breach of clause 14(1); but that question is not before me and I refrain from expressing any opinion thereon.

In the result, I make the declaration that the Purchaser was entitled to liquidated damages under clause 14(2) from December 31, 1981 to June 16, 1983 amounting to a sum of $376,874.12 and order that this amount together with interest held by the solicitors for the Vendor be paid to the Purchaser. The Vendor is to pay the costs of these proceedings.

*Order accordingly.*

Solicitors: *Y. H. Cheong*; *Lee & Lee.*

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## CHONG LOY SEN & ANOR. v. PUBLIC PROSECUTOR

**[A.Cr. J. (Thean J.) June 30, 1986]**

**[Singapore – Magistrate's Appeal No. 215 of 1984]**

*Copyright Law – Gramophone records – Possession for sale of pirated copies – Interpretation – Appeal by convicted person – Copyright (Gramophone Records and Government Broadcasting) Act (Cap. 188), ss.3(1) & 5(1), (2) – Criminal Procedure Code (Cap. 113), s. 179(e).*

*Criminal Law and Procedure – Opportunity to cross-examine the deponent of affidavit – Criminal Procedure Code (Cap. 113), s.179(e).*

The appellants were partners of a business known as Rainbow Sound Enterprise in Singapore. They were each convicted on 14 charges for being in possession for sale of pirated copies of gramophone records, an offence punishable under section 3(1) of the Copyright (Gramophone Records and Government Broadcasting) Act and were each fined $300 on each of the 14 charges. The tapes relating to the 14 charges were ordered to be forfeited.

**Held**, dismissing the appeal: (1) the words "copyright subsisted" in section 5(1)(a) of the Act obviously mean copyright subsisted in Singapore, as that is the copyright contemplated and recognised by the law of Singapore. If an affidavit in accordance with section 5(1) of the Act is used it is essential to state therein that at a particular date copyright in relation to the record in question subsisted in Singapore and the words "in Singapore" are necessary;

(2) the statutory definition of a "gramophone record" contemplates a sound track, other than a sound track associated with a cinematograph film, as a gramophone record. A recording of a song in a tape (which also contains a record of other songs) is a gramophone record within the meaning of the Act, and if the gramophone record of that song was made or reproduced without the consent lawfully given by the owner of the copyright of the record of such song, then it is a pirated copy within the meaning of section 2 of the Act.

*Cases referred to:*

(1) *Aw Theng Fung* v. *P.T. Fernando* (Magistrate's Appeal No. 39 of 1982) (Unreported).

(2) *Lam Radio & Record Limited* v. *P.T. Fernando* (Magistrate's Appeal No. 119 of 1981) (Unreported).
(3) *Kwah Hai Gong* v. *Public Prosecutor* [1979] 1 M.L.J. 16.
(4) *Heng Yik Fang* v. *Public Prosecutor* [1973] 1 M.L.J. 193.

MAGISTRATE'S APPEAL.

*Kan Ting Chiu* for the appellants.

*Miss O'Connor* for the Public Prosecutor.

*Cur. Adv. Vult.*

**Thean J.**: The appellants were each convicted on 14 charges for being in possession for sale of pirated copies of gramophone records, an offence punishable under section 3(1) of the Copyright (Gramophone Records and Government Broadcasting) Act, Chapter 188 ("the Act") and were each fined $300 on each of the 14 charges and the tapes relating to the 14 charges were ordered to be forfeited. Each of the 14 charges against the 1st appellant, apart from the names of the song and the singer, is as follows:

*CHARGE*
You, CHONG LOY SEN
Malaysian Identity Card No. 7936020

are charged that you, on or about June 10, 1981 at No. 6C, Golden Wall Flatted Factory, Jalan Rajah, Singapore 1232, did have in your possession for sale, jointly with TAN SIEW HONG ten (10) pirated copies of a gramophone record "Tracy Huang – Love Me Tender" and you have thereby committed an offence punishable under section 3(1) of the Copyright (Gramophone Records and Government Broadcasting) Act, Chapter 188."

And each of the 14 charges against the 2nd appellant, apart from the names of the song and the singer, is as follows:

*CHARGE*
You, TAN SIEW HONG
NRIC NO. 0045861/I

are charged that you, on or about June 10, 1981 at No. 6C, Golden Wall Flatted Factory, Jalan Rajah, Singapore 1232, did have in your possession for sale, jointly with CHONG LOY SEN ten (10) pirated copies of a gramophone record "Tracy Huang – Love Me Tender" and you have thereby committed an offence punishable under section 3(1) of the Copyright (Gramophone Records and Government Broadcasting) Act, Chapter 188."

The appellants are partners of a business carried on under the name and style of Rainbow Sound Enterprise at 6-C Golden Wall Flatted Factory, Jalan Rajah, Singapore. According to the certified extract of the business registration, the general nature of the business is that of manufacturing cassette tapes and import and export of tapes, and the 2nd appellant is registered as the person responsible in the management of the business of the partnership.

On June 10, 1981, Inspector Jim Lee Ah Lai (PW 2) led a party and raided the premises of the partnership at 6-C, Golden Wall Flatted Factory, Jalan Rajah. Included in the party were Detective Corporal David Lim, Detective Constable Sung Kok Ann, Detective Constable Toh Eng Yan, Photographer Detective Corporal Zakariah, members of the Singapore Phonogram Association, and one P.T. Fernando, a private investigator (PW 1). On arrival at the premises, they were informed by a male Chinese, Chong Swee Peng, that the 1st appellant, who was then not present there, was the person in charge of the factory. Chong was asked to get in touch with the 1st appellant, which he did. The 1st appellant subsequently arrived and identified himself as the person in charge of the factory. He was shown the search warrant and a search was then carried out at the premises and suspected pirated copies of cassette and cartridge tapes were seized. Thereafter, they searched a container which was parked outside the factory at a loading bay. The container was locked and the 1st appellant opened the container and various suspected pirated copies of cassette tapes were also seized. All the copies of cassette and cartridge tapes seized were loaded onto a lorry and also to a police bus and were brought to the premises of EMI (Singapore) Pte. Ltd. at Jurong where they were transferred to two containers. The containers were later brought to a warehouse at Ruby Industrial Complex under the charge of Commercial Crime Division's storekeeper, Sim Thye Seng (PW 3).

Subsequently, representatives of respective recording companies went to Ruby Industrial Complex with portable cassette players and cassette tapes which are true copies of the original records of songs. They listened to and compared the songs recorded in the true copies with those in the cassette tapes referred to in the charges. It was their evidence that the records of the songs contained in the cassette tapes seized and described in the charges were copies of the original recordings. The cassette tapes containing records of these songs were produced and admitted. The prosecution produced two affidavits (exhibits "P83" and "P125") affirmed by Carol Phillips, a director of International Recording Copyright Limited,

who deposed therein to the fact that on June 10, 1981, copyrights subsisted in Singapore in the respective gramophone records and the owners of the copyrights thereof were the persons respectively named in the affidavits and that the copies of the said gramophone records annexed to the affidavits were true copies of the records respectively; she made these affidavits on behalf of the owners of the copyrights in the said gramophone records. These two affidavits were admitted by the learned Magistrate under section 5(1) of the Act. Evidence was also adduced before the learned Magistrate to prove that the cassette tapes containing records of the songs described in the charges were not manufactured by or with the consent of the owners of the copyrights of the records or their licensees. At the close of the prosecution, the learned Magistrate found that a case against the appellants had been made out which, if unrebutted, would warrant their convictions; he therefore called upon the appellants to enter their defence. Both of them however elected to remain silent and no evidence was adduced on their behalf. The learned Magistrate convicted them on the 14 charges and fined each of them $300 for each of the 14 charges. Against these convictions, this appeal is now brought.

Mr. Kan on behalf of the appellants attacked the convictions on various grounds. His first submission is that the affidavits (P83 and P125) were not in compliance with section 5(1) of the Act and were wrongly admitted. It is convenient at this stage to set out section 5(1) of the Act which is as follows:

"5.(1) An affidavit made before a notary public by or on behalf of the owner of the copyright in any gramophone record and stating –

(a) that at the time specified therein, copyright subsisted in such record;

(b) that he or the person named therein is the owner of the copyright; and

(c) that a copy of the record annexed thereto is a true copy thereof,

shall be admitted in evidence in any proceedings under this Act on its production by the prosecution without further proof."

The objectionable part of each of the affidavits, according to Mr. Kan, is paragraph 2 thereof which (so far as relevant) is as follows:

"On June 10, 1981, copyright subsisted in Singapore in the following gramophone records and the owners of the copyright are as set out below:–
.... ."

Mr. Kan's complaint is centred on the two words, "in Singapore." He submitted that the inclusion of the words "in Singapore" in paragraph 2 of the affidavit was not provided for under section 5(1)(a) of the Act and that rendered the affidavit defective and inadmissible. He relied on two decisions of the High Court, both unreported, namely, *Aw Theng Fung* v. *P. T. Fernando*[1] and *Lam Radio & Record Limited* v. *P.T. Fernando.*[2] Miss O'Connor for the prosecution disputed that that was decided by the High Court in the two appeals; on the contrary she said that the appeal in *Aw Theng Fung* v. *P. T. Fernando* was disposed of on the ground that the affidavit should have stated the additional words "in Singapore" which it did not and that the appeal in *Lam Radio & Record Pte. Ltd.* v. *P.T. Fernando*, though successful, was not allowed on the ground that the words "in Singapore" were present in the affidavit in question. I have perused the records of these two appeals and there is nothing therein which really substantiates Mr. Kan's argument and I am inclined to accept what Miss O'Connor said. In my view, the words: "copyright subsisted," in section 5(1)(a) of the Act obviously mean copyright subsisted in Singapore, as that is the copyright contemplated and recognised by the law of Singapore. Though the words, "in Singapore," are not present, it is implicit that that statutory provision refers to copyright in Singapore. As Miss O'Connor submitted, copyright does not exist *in vacuo;* it must be linked to a country territorially. However, when it comes to a question of determining whether copyright in relation to a gramophone record subsists in Singapore, it seems to me essential to show as a matter of evidence that copyright subsists in Singapore in that record. Consequently, if an affidavit in accordance with section 5(1) of the Act is used it is essential to state therein that at a particular date copyright in relation to the record in question subsisted in Singapore and the words "in Singapore" are in my view necessary.

Mr. Kan also argued that the learned Magistrate wrongly accepted the two affidavits, P83 and P125, without allowing the appellants an opportunity to cross-examine the deponent on the affidavits and he relied on section 179(e) of the Criminal Procedure Code, under which in a trial before a Magistrate's Court or a District Court, an accused shall be allowed to cross-examine all the witnesses for the prosecution. The two affidavits

were admitted by the learned Magistrate under section 5(1) of the Act, and under section 5(2) they constitute *prima facie* evidence of the matters stated therein respectively and until the contrary is proved, the Court shall presume that the affidavits were made by or on behalf of the owners of the copyright in the records stated therein. If Mr. Kan wished, at that time, to cross-examine the deponent on her affidavits, he should have applied to the learned Magistrate for leave to do so. That he did not do. According to the record, no application appeared to have been made by him to the learned Magistrate for leave to cross-examine the deponent on the two affidavits; nor did the learned Magistrate indicate in any way his refusal to any application, if made, for leave to cross-examine the deponent. Mr. Kan merely argued that the affidavits were defective and inadmissible in that they contained the additional words "in Singapore," and was content to let the matter rest after the affidavits were admitted. In the circumstances, it is hardly open to him to complain that no opportunity had been given to him to cross-examine the deponent.

In each of the charges brought against each appellant, the prosecution treated a record of each song in a cassette tape, *i.e.* a sound track of a song in the tape, as a gramophone record within the meaning of section 2 of the Act. In other words, each of the charges brought by the prosecution relates only to a recording of one song out of a collection of songs as recorded in a tape and there was no evidence at all as to the remaining songs. This obviously was intended to overcome the difficulty encountered in *Kwah Hai Gong* v. *Public Prosecutor*[3] where the High Court held that in order to succeed, it was essential for the prosecution to prove, *inter alia,* that the cassette tape, alleged to be a pirated copy, is an exact copy or reproduction of the gramophone record in which copyright subsists. Mr. Kan submitted that this course adopted by the prosecution was untenable and that a sound track of a song in a tape was not a gramophone record. Such an argument would probably be sustainable but for the meaning of the term, gramophone record, as defined in section 2 of the Act. Under section 2, unless the context otherwise requires, a gramophone record means "the material first embodying the recording of a sequence of sounds capable, by the use of that material, of being automatically reproduced aurally, but does not include a sound track associated with a cinematograph film." Clearly the term, "gramophone record," under the Act assumes a meaning wider than its ordinary meaning. Thus, in the case of *Heng Yik Fang* v. *Public Prosecutor,*[4] the High Court held that cartridge and cassette tapes are gramophone records within the meaning of the Act. The learned Chief Justice said, at page 194:

> "In my opinion the definition must be read in the context of the Act as a whole. The Act is an enactment dealing specifically with one subject matter, namely, the provision of penalties for infringement of copyrights in gramophone records and to permit Government to broadcast by radio or television musical works or gramophone records without infringing any copyright. The Act creates one offence only, namely, by providing that any person 'who makes, reproduces, imports for sale, sells, exposes or offers for sale, or has in his possession for sale, any pirated copies of any gramophone record, shall be guilty of an offence' and provides the penalty for such offence. The Act does not leave the expression 'gramophone record' to be construed in its ordinary dictionary meaning but gives it a much wider meaning by defining it in section 2.
>
> Accordingly, in my judgment the cartridge and cassette tapes found in the possession of the appellant come within the definition of 'pirated copies' in the Act."

It seems to me that the statutory definition of a "gramophone record" contemplates a sound track, other than a sound track associated with a cinematograph film, as a gramophone record. A sound track of a song in a tape, which is a recording of a song, is a recording of sequence of sounds capable by the use of the tape of being automatically reproduced aurally. The fact that the tape contains a recording of other songs is immaterial; it is irrelevant to the question whether the sound track itself falls within the statutory definition. In my view, a recording of a song in a tape (which also contains a record of other songs) is a gramophone record within the meaning of the Act, and if the gramophone record of that song was made or reproduced without the consent lawfully given by the owner of the copyright of the record of such song, then it is a pirated copy within the meaning of section 2 of the Act.

It was further argued by Mr. Kan that the prosecution had failed to prove that the copies of the cassette tapes referred to in the charges were pirated copies, *i.e.* copies made or reproduced without the consent lawfully given by the owners of the copyright in the records of which these copies were made or reproduced. It was said that all that was proved before the learned Magistrate was that the labels and inlay cards attached or affixed to the cassette tapes were not those of the owners of the copyright in question; but it was not proved that the cassette tapes were not tapes of the owners. I find no merit in this argument. There was

ample evidence on which the learned Magistrate based his finding that the copies of the cassette tapes referred to in the charges were pirated copies. At any rate, the point in issue is not whether the tapes are not the tapes of the owner of the copyright in the record, but whether the records of the songs in the tapes are pirated copies, *i.e.* copies made or reproduced without the consent of the owner of the copyright in the record.

Lastly, it was argued that the learned Magistrated erred in his finding that the seized tapes were in the possession of the appellants. It was not disputed that at the material time the appellants were partners of the business carried on at 6C, Golden Wall Flatted Factory, Jalan Rajah and the 2nd appellant was the person responsible for the management of the partnership business. The pirated copies were found either in the business premises or in the container parked just outside the premises at a loading bay. When the police raided the business premises the 1st appellant identified himself as the person in charge at the premises and he had the key to the container and he opened the container. He told PW 2 that the tapes which were then being seized were for export. In my view, on the totality of the evidence the learned Magistrate was justified in his finding that the pirated copies were in the possession of the appellants for sale at the material time.

In the result, I dismiss the appeal of the appellants and affirm the convictions and sentences.

*Appeal dismissed.*

Solicitors: *R.C.H. Lim & Co.*

## MALAYSIAN REPORTS

# LIAN FOONG HOUSING DEVELOPMENT (M) SDN. BHD. v. TOYO TEXTILES INDUSTRIES SDN. BHD. & ANOR.

**[S.C. (Salleh Abas L.P., Seah & Syed Agil Barakbah S.C. JJ.) December 5, 1985]**

**[Kuala Lumpur — Supreme Court Civil Appeal No. 251 of 1985]**

*Torts — Nuisance and trespass — Interference of natural stream by defendants — Causing flooding and water-logging to plaintiff's land — Question of liability.*

*Damages — Quantum — Assessment and principles — Remedial measures — Deposit in court by defendants.*

This was an appeal from the decision of Shankar J. in [1986] 1 M.L.J. 412. The Supreme Court dismissed the appeal in respect of liability and set aside the judgment of the High Court in respect of quantum on terms as set forth in the Order of Court dated December 5, 1985 reproduced below.

SUPREME COURT.

*Dato' Kam Woon Wah* (*T. Kuhanandan* and *Kam Tai Keong* with him) for the appellant.

*Gary Yuen* for the respondents.

*ORDER*

*THIS APPEAL* coming on for hearing on the 5th day of December, 1985 in the presence of Dato' Kam Woon Wah (Mr. T. Kuhanandan and Mr. Kam Tai Keong with him) of Counsel for the Appellant and Mr. Gary Yuen of Counsel for the Respondents *AND UPON READING THE RECORD OF APPEAL* filed herein *AND UPON HEARING* Counsel as aforesaid *IT IS HEREBY ORDERED* that the Appeal in respect of liability be and is hereby dismissed *AND IT IS FURTHER ORDERED* that in respect of quantum the Appeal be and is hereby allowed as follows:

1) the Order of the trial judge that the Appellants pay the Respondents the sum of $94,500.00 which is three-quarters of M$126,000.00 as damages for loss of use be and is hereby set aside;

2) the Order of the trial judge that the Appellants do deposit in Court *or* to furnish a bank guarantee in terms acceptable to the Respondents for the sum of $450,000.00 which will be held in reserve until such time as the decision of the Court is rendered on the final estimates for the costs of remedial measures be and is hereby set aside;

3) that the Appellant do pay the Respondents a total sum of M$108,750.00 which is three-quarters of M$145,000.00 as damages;

*AND IT IS ALSO ORDERED* that the Appellant do pay the Respondents interest at the rate of 4% per annum from the date of filing of this suit until the date of payment *AND IT IS ALSO FURTHER ORDERED* that each party